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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 UNITED STATES OF AMERICA,

No. CR 05-0324 MMC

12 Plaintiff,

13 v.

**ORDER DENYING IN PART AND  
DIRECTING GOVERNMENT TO  
RESPOND IN PART TO DEFENDANT'S  
MOTION TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE**

14 DENNIS CYRUS, JR.,

15 Defendant  
\_\_\_\_\_/

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17 Before the Court is defendant Dennis Cyrus, Jr.'s "Motion to Vacate, Set Aside, or  
18 Correct Sentence by a Person in Federal Custody in Violation of the United States  
19 Constitution, Law and Treaties of the United States and Congress."<sup>1</sup> Having read and  
20 considered the motion, the Court rules as follows.

21 Section 2255 provides that "[u]nless the motion and the files and records of the case  
22 conclusively show that the prisoner is entitled to no relief, the court shall cause notice  
23 thereof to be served upon the United States attorney." See 28 U.S.C. § 2255(b).

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26 <sup>1</sup>Although the motion was filed by the Clerk of Court on October 21, 2014,  
27 defendant, who proceeds pro se, declares that he presented the motion to prison  
28 authorities for mailing on October 9, 2014. (See Certificate of Service, filed October 21,  
2014.) Under the "mailbox rule," a filing by a pro se prisoner is deemed filed on the date  
such prisoner presents it to prison officials for mailing. See Houston v. Lack, 487 U.S. 266,  
274-76 (1988); see also Rules Governing Section 2255 Procedures, Rule 3(d).  
Consequently, the Court will treat the motion as having been filed on October 9, 2014.



1 In his motion, defendant asserts three claims: (1) “the government suppressed and  
2 withheld material evidence and information concerning its witness, Debbie Madden,”  
3 specifically, that she “was a thief, being investigated for stealing and tampering with the  
4 very narcotics for which she was responsible for testing,” in violation of Brady v. Maryland,  
5 (see Mot. at 26); (2) “the indictment was multiplicitious” because it “charge[d] multiple  
6 counts for a single offense” (see Mot. at 29); and (3) defendant was “denied effective  
7 assistance of counsel” (see Mot. at 30), because counsel did not discover the above-  
8 referenced evidence concerning Debbie Madden and did not challenge the assertedly  
9 multiplicitious charges in the indictment (see Mot. at 32).

#### 10 **A. Claims 1 and 2**

11 The issue set forth in Claim 1 was raised by defendant’s trial counsel in several  
12 motions (see Docket Nos. 1615-16, 1618, 1628, 1638-39, 1647); following hearings on the  
13 matter, the Court found the government had not violated Brady and, specifically, that it had  
14 not withheld any material evidence or information concerning Debbie Madden (see Docket  
15 Nos. 1681 at 15-19, 1665 at 19-20). The issue set forth in Claim 2 was raised by trial  
16 counsel in a motion to dismiss the indictment (see Docket No. 911), and, following a  
17 hearing, the Court found none of the counts was subject to dismissal as multiplicitious (see  
18 Docket Nos. 109, 1600 at 101-03). Defendant did not challenge the Court’s findings as to  
19 either such issue on direct appeal.

20 In light of the above, it would appear, at least on first impression, that Claims 1 and 2  
21 are procedurally defaulted. See United States v. Braswell, 501 F.3d 1147, 1149 n.1 (9th  
22 Cir. 2007) (holding claim raised in federal habeas proceeding is “procedurally defaulted”  
23 when claim “not raised on direct appeal, absent a showing of cause and prejudice or actual  
24 innocence”). Nonetheless, and although at least one circuit has approved a court’s sua  
25 sponte finding of procedural default, see Hines v. United States, 971 F.2d 506, 508 (10th  
26 Cir. 1992) (holding district court “can address sua sponte a § 2255 movant’s failure to raise  
27 [an] issue on direct appeal”), the Court finds it appropriate that the government address the  
28 issue of procedural default and/or the merits of Claims 1 and 2.



1 **B. Claim 3**

2 In Claim 3, defendant, as noted, contends his trial counsel was ineffective. “A  
3 convicted defendant’s claim that counsel’s assistance was so defective as to require  
4 reversal of a conviction . . . has two components.” Strickland v. Washington, 466 U.S. 668,  
5 687 (1984). “First, the defendant must show that counsel’s performance was deficient,”  
6 which “requires showing that counsel made errors so serious that counsel was not  
7 functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id.  
8 “Second, the defendant must show that the deficient performance prejudiced the defense.”  
9 Id. “Unless a defendant makes both showings, it cannot be said that the conviction . . .  
10 resulted from a breakdown in the adversary process that renders the result unreliable.” Id.

11 Here, although defendant asserts his “counsel was ineffective for failing to discover”  
12 the above-referenced evidence concerning Debbie Madden (see Mot. at 32), the record  
13 establishes the contrary. Specifically, defendant’s trial counsel brought to the Court’s  
14 attention the very evidence to which defendant refers, specifically, that Debbie Madden was  
15 under investigation for stealing and tampering with narcotics, and counsel moved, albeit  
16 unsuccessfully, for a new trial in light of such evidence having been discovered. (See  
17 Docket Nos. 1638-39, 1644, 1647.)

18 Defendant’s assertion that his counsel was ineffective for not “identifying the  
19 multiplicitious charges in the indictment” (see Mot. at 32) likewise is belied by the record.  
20 Specifically, defendant’s trial counsel did file a motion, and argued at a contested hearing,  
21 that four counts in the indictment be dismissed as multiplicitious. (See Docket No. 911.)<sup>2</sup>

22 In sum, the record establishes that the actions defendant asserts were not taken by  
23 his trial counsel were, in fact, taken by said counsel.

24 Accordingly, as “the files and records of the case conclusively show that [defendant]  
25 is entitled to no relief” on Claim 3, see 28 U.S.C. § 2255(b), said claim will be dismissed.

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<sup>2</sup>Defendant does not specify the particular counts he claims are multiplicitious.



1 **CONCLUSION**

2 For the reasons stated above,

3 1. To the extent the motion seeks relief on the grounds stated in Claims 1 and 2, the  
4 Court hereby sets the following briefing schedule:

5 a. No later than December 5, 2014, the government shall file its opposition.


6 b. No later than January 5, 2015, defendant shall file any reply.

7 c. As of January 5, 2015, the Court will take the matter under submission.

8 2. To the extent the motion seeks relief on the grounds stated in Claim 3, the motion  
9 is hereby DENIED.

10 **IT IS SO ORDERED.**

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12 Dated: November 4, 2014

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14 MAXINE M. CHESNEY  
15 United States District Judge  
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